SUPREME COURT, U.S.
FILED
99 750 SEP 28 1999
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1999

Mitsue Takahashi,

Petitioner,

v.

Carolyn Phillips, an individual;
Milrod & Phillips,

Respondents.

Petition for Writ of Certiorari
To the Court of Appeal of the State
of California, Fifth Appellate District

PETITION FOR WRIT OF CERTIORARI

Jonathan A. Carlson
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QUESTIONS PRESENTED

Should attorneys, or a law firm, be allowed to breach the attorney-client legal services contract because the firm and its attorneys, became dissatisfied with the terms in the contract? Should a law firm be allowed to commit legal malpractice, and potentially participate in a conspiracy to commit fraud on the client? Should a former attorney, Carolyn Phillips, be allowed to testify in a breach of contract malpractice action against her law firm in light of a legal service contract to matters that are prejudicial to her former clients? Should a law firm as attorneys of record be allowed to breach its legal services contract based upon a declaration by one of its attorneys in support of a motion to withdraw that contained concealment and false representations? If a court allows an attorney in a law firm to withdraw from a case where the firm represents the client, does that automatically render the law firm's legal services agreement null and void and relieve the law firm from any responsibility for damages and other contractual, fiduciary, and professional duties and responsibilities to its client?

PARTIES

The petitioner is Mitsue Takahashi. The respondents are Carolyn Phillips, an individual, and the law firm of Milrod & Phillips and its principals and/or attorneys.

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OPINION BELOW

The case is not officially reported. The opinion was issued by the Court of Appeal of the State of California, Fifth Appellate District, affirming the judgment of the trial court. See Appendix A. A petition for rehearing was filed in the Court of Appeal of the State of California for the Fifth Appellate District which was denied. See Appendix B. A Petition For Review was filed before the California Supreme Court on May 24, 1999 and was denied in an order filed June 30, 1999. See Appendix C.

CONCISE STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(a). The date of the entry of the order by the California Supreme Court denying petitioner's Petition For Review was entered on June 30, 1999.

CONSTITUTION AND STATUTES

The constitutional provisions, statutes and regulations considered are the Fourteenth Amendment of the Constitution of the United States, California Business and Professions Code Section 6068 and California Rules of Professional Conduct, Rule 3-700(C)(1)(A).

STATEMENT OF THE CASE

Petitioner filed a legal malpractice action in the Fresno County, California, Superior Court against the law firm and its attorneys that contracted to represent her in an employment discrimination lawsuit until final disposition of the case. In July of 1991, petitioner

contracted with respondent law firm Milrod & Phillips under a legal services agreement that was based on a contingency fee arrangement. The legal service agreement provided, among other things, that petitioner would pay a deposit to respondent law firm for attorneys fees and litigation costs up to the refundable deposit of $25,000.00. Respondent law firm would pay for all fees and costs whether petitioner prevailed or not. The $25,000.00 deposit would be refunded to petitioner whether there was any recovery or not. Once this threshold was reached, respondents agreed to pay all fees and costs and represent petitioner to final disposition of the case on a contingency fee basis and the deposit would be refunded to petitioner.

Approximately one-year after the legal services agreement was entered into, respondents were paid the entire refundable deposit of $25,000.00 set forth in the agreement. Shortly after this threshold was met, respondents began downplaying petitioner's chances for success, and pressured petitioner to commence settlement negotiations. Petitioner never authorized respondents or any other legal personnel at the respondent law firm to commence settlement negotiations in the underlying action.

During personnel manager's deposition in the underlying action in which respondent Phillips was conducting the deposition, upon returning from a lunch break respondents attorney abruptly informed petitioner that she was terminated. Shortly thereafter, respondent Phillips alleged a breakdown in the attorney-client relationship with petitioner. Petitioner was terminated from her employment in the middle of the deposition of the personnel manager of petitioner's employer after she had paid respondent law firm the refundable

$25,000.00. Respondent Phillips, a partner in respondent law firm, filed a motion to withdraw as petitioner's attorney of record. In a declaration in support of the withdrawal motion, and at the hearing on the motion, respondent attorney Phillips failed to inform the trial judge and petitioner that a motion for summary judgment was pending in the underlying action. Despite this concealment and misrepresentation, the trial judge granted the motion to withdraw and petitioner was forced to hire new counsel. Subsequently, respondent law firm filed a Notice of Attorneys Lien of over $20,000.00, even though the legal services agreement was contingent.

Petitioner appealed to California's Fifth District Court of Appeal to challenge several evidentiary matters as well as contesting the negligence and breach of contract by respondent law firm. A Petition For Rehearing was filed in the Fifth District Court of Appeal in the State of California and was denied. A Petition For Review was filed with the California Supreme Court on May 24, 1999, and in an order dated June 30, 1999, the California Supreme Court denied the Petition For Review.

REASONS FOR GRANTING PETITION

In the trial of the malpractice action in the Fresno County, California, Superior Court, a special jury instruction was given to the jury concerning the legal services agreement between petitioner and respondents. The instruction was based upon Lear, Inc. v. Adkins, 395 U.S. 653, 668, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969). The instruction read, in part: "A person who is a party to a contract may not repudiate his or her promises simply because he or she becomes dissatisfied with the bargain he or she made."

It is well settled in this court that if it can be shown an attorney-client contract was obtained by any undue influence of the attorney over the client or a fraud or imposition or that the compensation to the attorney was clearly excessive so as to amount to extortion, "the court, will in a proper case protect the party aggrieved." Taylor v. Bemiss, 110 U.S. 42, 46, 3 S.Ct. 441, 28 L.Ed. 64 (1884). Moreover, this court has determined that attorneys impliedly contract "to exercise reasonable care and skill in the performance of the undertaking", and if they fail to do so, the attorneys are responsible for the loss occasioned by such neglect or want of care and skill. Savings Bank vs. Ward, 100 U.S. 195, 25 L.Ed. 621 (1880). Indeed, even Justice Black in his dissent in Link v. Wabash Railroad Company, 370 U.S. 626, 647, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) noted that a client has a right to rely upon the fact that a lawyer has a license, and to believe that the lawyer has the ability to look out for the case he or she has undertaken. Id. at 1397.

This court should grant the current petition in order to protect petitioner's due process rights under

the Fourteenth Amendment based upon the following. Petitioner contracted directly with the respondent law firm for representation to final disposition of the underlying action set forth in the statement of the case. Although this court has indicated that a client has the right to rely upon the fact that an attorney is licensed, it is clear that respondent law firm became dissatisfied with an agreement originally made with petitioner. Respondent Phillips filed a motion to withdraw as attorney of record and respondent law firm consequently breached its contract with petitioner. Thus, it is apparently clear that petitioner's attorneys in the underlying action breached their contract with petitioner.

California Business and Professions Code Section 6068(c) provides that an attorney has an absolute duty to maintain actions that appear to him or her to be legal or just. California Rule of Professional Conduct 3-700(C)(1)(a) provides that an attorney may withdraw if a client insists upon pursuing a claim that is not warranted under existing law or cannot be supported by good-faith argument for an extension, modification, or reversal of existing law. Neither the above cited statute or rule has been interpreted by this Court on the grounds that a petitioner has been denied due process under the Fourteenth Amendment.

Petitioner's due process rights were seriously infringed upon by the breach of contract by respondent law firm in the underlying action. Petitioner's attorneys subsequently testified in the current matter of fraudulent, irrelevant and immaterial matters concerning petitioner to smear her reputation, testified to prior and ongoing legal claims, and testified regarding the outcome of the underlying case. Such conduct seriously

infringed upon petitioner's due process rights and the attorney-client relationship.

Under existing California law cited above, a California attorney has a duty to maintain actions that appear to be legal or just, and cannot withdraw unless the claim that is presented is not warranted under existing law or by a good-faith argument for an extension, modification, or reversal of existing law. Respondents were in violation of these statutes, and thus infringed upon petitioner's due process rights based upon the following. First, the motion to withdraw as petitioner's attorneys of record in the underlying action, and the subsequent breach of contract by the law firm, was based upon misleading and fraudulent evidence, and the failure to notify the trial court of a pending dispositive motion. Second, respondent attorneys were allowed to testify to prejudicial matters in the current action and testify as to the outcome of the underlying litigation. Respondent attorneys breached the legal services contract by withdrawing without sufficient and supportive just cause evidence. Respondent attorneys were allowed to testify as to prejudicial, irrelevant, extraneous and unlawful evidence which infringed upon petitioner's due process rights.

This court should grant the current petition in order to determine the scope of a law firm's duties to its client under the California statutes cited herein, and to determine whether petitioner's due process rights were infringed upon by the breach of the legal services contract in the underlying action. The proceedings in the California courts raise serious issues as to whether petitioner's due process rights under the Fourteenth Amendment were violated.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
APR 13 1999
Eve Sproule Court Administrator/Clerk
By_____
Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MITSUE TAKAHASHI, Plaintiff and Appellant, v. CAROLYN PHILLIPS et. Al., Defendants and Respondents.	F027379 (Super. Ct. No. 507851-4) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Franklin P. Jones, Judge.

Brian K. Ross for Plaintiff and Appellant.

Murphy, Pearson, Bradley & Feeney and Karen M. Goodman for Defendants and Respondents.

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This appeal concerns evidentiary errors which allegedly occurred during the trial of a breach of contract/legal malpractice action. Plaintiff and appellant, Mitsue Takahashi, contends the trial court abused its discretion by admitting evidence which was highly

prejudicial and of little probative value. The evidence at issue included statements regarding a psychiatric evaluation of appellant and details concerning other legal proceeding instituted by appellant.

Appellant correctly concludes the disputed evidence was damaging to her case; however, its probative value outweighed the potential prejudice. In the context of the issues presented, the trial court did not abuse its discretion in admitting this evidence.

STATEMENT OF THE CASE AND FACTS

In November 1990, appellant filed a complaint in pro per against her employer, Farmers Insurance. Appellant alleged she had been discriminated against with regard to promotions because of her Asian ancestry.

In July of 1991, appellant consulted with respondent , Carolyn Phillips, regarding this discrimination complaint. Thereafter, appellant hired the law firm of Milrod & Phillips to represent her.

The terms of the attorney-client relationship were set forth in a written legal services agreement. Under this contract, the law firm agreed to provide "representation to final disposition of Takahashi v. Farmers Insurance." In exchange, appellant agreed to pay fees of $125 per hour until she had expended $25,000. After appellant had reached this $25,000 threshold, the law firm agreed it would work on a contingency fee basis. Appellant also agreed to be truthful and cooperative with the law firm. Further, the parties acknowledged that the attorneys could not guarantee any particular result.

In May and June 1992, appellant was deposed by counsel for Farmers. During the course of this eight-day deposition, Phillips became concerned about the viability of appellant's case for several reasons. First,

although volumes of documents covering appellant's 20-year employment history with Farmers were reviewed, there "wasn't a piece of paper in [appellant's] file ... that substantiated her claim that she had applied for a promotion and had been denied for discriminatory purposes." Second, and of even greater concern to Phillips, was appellant's performance at the deposition. Based on appellant's deposition testimony, Phillips concluded appellant had misperceived what had occurred at Farmers. Further, it became clear to Phillips that she was not communicating well with appellant.

While appellant's deposition was in progress, Phillips received a report from Dr. Lloyd, one of appellant's treating psychiatrists. Phillips had requested appellant's medical records as part of her analysis of the damage element of the case.

Phillips found Dr. Lloyd's report both significant and disturbing. Dr. Lloyd diagnosed appellant as suffering from a paranoid personality disorder which interfered with appellant's ability to perceive reality accurately. Thus, the report confirmed Phillips's concern that appellant would not be a credible witness. Further, it appeared from the report that this personality disorder was long-standing.

Phillips's doubts regarding the merits of this lawsuit were also validated by appellant's "letter writing campaign." Beginning in May 1992, appellant wrote a series of rambling letters to Phillips. These letters often included bizarre comments and positions. For example, appellant continually made references to her belief that Livingston School District leaders, Farmers Insurance employees, and her former attorneys had conspired against her. Appellant insisted that the action she filed against the Livingston School District for wrongful termination was relevant to the Farmers Insurance

case. In appellant's mind, these cases closely paralleled one another. It was also apparent from these letters that appellant had filed a legal malpractice action against the attorney who had handled the Livingston School District case because that attorney had not followed appellant's instructions.

Phillips expressly told appellant not to raise the Livingston School District case in the current Farmers Insurance case. Phillips warned appellant that if she insisted on injecting these other termination and conspiracy claims into the Farmers case, Phillips might not be able to continue to represent her. Nevertheless, appellant continued to assert her conspiracy theory.

By March 1993, Phillips concluded she could no longer represent appellant and requested appellant to sign a substitution of attorneys. Phillips informed appellant that their relationship had suffered an irremediable breakdown due to their differing opinions on the breadth and value of the lawsuit. However, appellant refused to consent to the withdrawal.

Phillips then filed a motion to withdraw. In opposing this motion, appellant submitted a letter to the court which accused Phillips of deliberately injuring appellant and damaging the case. Appellant further stated Phillips had failed "to use ordinary prudence and diligence to meet her professional responsibilities." On April 27, 1993, the trial court permitted Phillips to withdraw as attorney of record for appellant.

Appellant obtained substitute counsel and the Farmers case proceeded to trial. However, after appellant presented her case, the trial court granted a nonsuit.

On April 15, 1994, appellant filed the underlying complaint against Phillips and Milrod & Phillips for breach of contract and negligence. Appellant alleged

Phillips had breached the legal services agreement by withdrawing from the Farmers Insurance case. Appellant also asserted Phillips had failed to handle the Farmers case competently.

The case proceeded to a jury trial in September 1996. The jury returned a defense verdict finding that Phillips had neither breached the legal services agreement nor committed malpractice.

This appeal is based on three alleged evidentiary errors. Appellant contends the trial court abused its discretion when it permitted Phillips to introduce evidence regarding: appellant's psychiatric problems; unrelated legal proceedings; and the outcome of the Farmers case.

DISCUSSION

The trial court properly admitted the disputed evidence.

The underlying complaint is founded on appellant's contention that Phillips breached the legal services agreement when she withdrew from the Farmer's case. Thus, the primary issue at trial was whether there was sufficient cause for Phillips to withdraw.

An attorney is often confronted with clashing obligations imposed by our system of justice. For example, and attorney has an obligation not only to protect his or her client's interests but also to respect the legitimate interests of the bar and the judiciary and to promote the fair administration of justice. (*Kirsch v. Duryea* (1978) 21 Cal.3d 303, 309.) To this end, the Business and Professions Code prohibits an attorney from maintaining an action which does not appear to the attorney to be meritorious. (Bus. & Prof. Code. § 6068, subd. (c); *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 980.) Thus, if an attorney doubts either the client's

credibility or the legitimacy of the claim, the attorney should withdraw from employment. (*Davis v. State Bar* (1983) 33 Cal.3d 231, 238; *Kirsch v Duryea, supra*, 21 Cal.3d at pp. 309-310.) Further, if the attorney and the client constantly disagree about the conduct of the litigation, the attorney should be permitted to withdraw from the case. (*Heple v. Kluge* (1951) 104 Cal.App.2d 461, 462.)

Rules of Professional Conduct, rule 3-700(C), sets forth certain circumstances which may justify an attorney's withdrawal from employment. These include situations where the client insists on presenting a claim that is not warranted under existing law or where, by other conduct, the client "renders it unreasonably difficult for the member to carry out the employment effectively." (Rules of Prof. Conduct, rules 3-700(C)(1)(a) and (d).) In the Farmers case, the trial court relieved Phillips of her duty to represent the appellant on the ground that Phillips could no longer effectively do so.

It is against this backdrop that the trial court's rulings on the admissibility of the disputed evidence must be analyzed. In making such rulings, the trail court starts with the proposition that "all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) The trial court is given wide discretion to determine relevance and its decision will be reversed only if there has been a prejudicial abuse of discretion. (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932; *DePalma v. Westland Software House* (1990) 225 Cal.App.3d 1534, 1538.)

a. The evidence of appellant's paranoid personality disorder.

Phillips was permitted to testify at trial that Dr. Lloyd's psychiatric report on appellant had a significant impact on Phillips's evaluation of the Farmers case. Phillips explained that Dr. Lloyd's diagnosis of paranoid personality disorder served to strengthen and confirm her doubts regarding both the viability of the case and her ability to communicate with appellant. Following this testimony, the jury was admonished that the statements relating to Dr. Lloyd's diagnosis were not being admitted for the truth of their content. Rather, they were being admitted for the purpose of showing their impact on Phillips and her analysis of the case.

Appellant challenges this evidence on two grounds. First, appellant argues Phillips's testimony regarding Dr. Lloyd's report constituted inadmissible hearsay. Second, appellant contends this testimony should have been excluded as being unduly prejudicial. (Evid. Code § 352.)

"Hearsay is evidence of an out-of-court statement that is offered by its proponent to prove what it states." (*People v. Alvarez* (1996) 14 Cal.4th 155, 203.) Except as otherwise provided by law, hearsay is inadmissible. (Evid. Code, § 1200, subd. (b).)

Here, however, statements regarding Dr. Lloyd's diagnosis were not offered to prove the matters asserted, i.e., that appellant in fact suffered from paranoid personality disorder. Rather, this testimony was offered to corroborate Phillips's testimony that, in her mind, there had been a complete breakdown in her relationship with appellant. Such extrajudicial statements which lend credibility to an asserted state-of-mind are not hearsay. (*People v. Duran* (1976) 16 Cal.3d 282, 295.)

Further, contrary to appellant's position, the probative value of this evidence was not outweighed by

the probability that it would create a "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code § 352.) In the Evidence Code section 352 context, evidence is not prejudicial merely because it undermines the opponent's position or is inconvenient. (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008.) "Prejudicial" is not synonymous with "damaging." (*Ibid.*) Rather, this prejudice "Applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*Ibid.*)

There is no question that the testimony regarding appellant's personality disorder was damaging to her case. However, it was also highly probative. At issue was whether Phillips's decision to withdraw as the attorney of record for appellant was justified under the Business and Professions Code and the Rules of Professional Conduct. Consequently, Phillips's subjective evaluation of both the merits of the case and her ability to continue to adequately represent appellant was a critical component of her defense. Due to the mutual confidence and trust that is necessary before an attorney-client relationship can be effective, it was necessary for the jury to examine Phillips's state-of-mind before it could evaluate the reasonableness of her conduct. Since Dr. Lloyd's report had a significant impact on Phillips's state-of-mind, the probative value of Phillips's testimony outweighed its potential prejudice. Thus, the trial court did not abuse its discretion in admitting this evidence.

b. The evidence of appellant's claim against the Livingston Unified School District.

Evidence regarding the lawsuit appellant filed against the Livingston Unified School District was presented to the jury through both testimony and exhib-

its. Appellant takes the position that, because this claim was unrelated to the Farmers case, such evidence was more prejudicial than probative. Appellant notes that as the attorney of record, Phillips could, and in fact did, prevent the injection of this school district case into the Farmers case. According to appellant, the only purpose this evidence served was to portray her as unreasonably litigious.

However, appellant has misconstrued the significance of the Livingston Unified School District case with respect to her complaint against Phillips. Phillips repeatedly advised appellant the Livingston case had no relevance to the Farmers case. Nevertheless, appellant continued to insist that the two cases were intertwined and demanded that Phillips investigate this perceived connection. From this conduct, it became apparent to Phillips that she could not communicate with appellant. Further, appellant and Phillips clearly did not agree on how the litigation should be conducted. Thus, appellant's perception of the Livingston Unified School District case had a significant impact on Phillips's decision to withdraw from the Farmers case. As such, it was important for the jury to be informed of the existence of this previous case and how it affected the attorney-client relationship. Therefore, this evidence was highly probative.

Appellant again focuses on the prejudicial nature of the evidence. It is true that evidence of past lawsuits could lead a jury to conclude that the party was unreasonably litigious. However, as discussed above, evidence is not unduly prejudicial merely because it is damaging. Where, as here, the damage naturally flows from relevant, highly probative evidence, it should not be excluded as unduly prejudicial under Evidence Code section 352. (*Vorse v. Sarasy, supra*, 53 Cal.App.4th at

pp. 1008-1009.) Thus, the trial court did not abuse its discretion when it admitted the evidence of appellant's Livingston Unified School District claim.

c. Evidence of the outcome of the Farmers case.

As noted above, the Farmers case ended when the trial court granted the defendant's motion for a nonsuit. Appellant concedes that this fact was properly presented to the jury. However, appellant contends that other details regarding the merits of the Farmers case were improperly admitted. Appellant takes the position that this evidence was irrelevant.

Part of Phillips's reason for withdrawing from the Farmers case was her loss of faith in the merits of the action. As discussed above, such loss of faith is sufficient reason for an attorney to withdraw from representation. (*Kirsch v. Duryea, supra*, 21 Cal.3d at pp. 309-310) Thus, the fact that the court later determined that appellant did not present a prima facie case for relief in the Farmers case is relevant. Such evidence tends to prove that Phillips's conduct in withdrawing from the case was reasonable. Therefore, the trial court did not abuse its discretion in admitting this evidence.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

Levy, J.

WE CONCUR:

Ardiaz, P.J.

Dibiaso, J.

COURT OF APPEAL
FIFTH APPELLATE DISTRICT

FILED

MAY 4 – 1999
Eve Sproule Court Administrator/Clerk
By_____
Deputy

IN THE
Court of Appeal of the State of California
IN AND FOR THE
Fifth Appellate District

MITSUE TAKAHASHI, Plaintiff and Appellant, v. CAROLYN PHILLIPS et. Al., Defendants and Respondents	F027379 (Super. Ct. No. 507851-4) ORDER

Appellant's petition for rehearing filed in the above entitled matter is denied.

Dated: MAY 4 – 1999

_____
Levy, J.

WE CONCUR:

_____
Ardiaz, P.J.

_____
Dibiaso, J.

SUPREME COURT
FILED
JUN 30 1999
Robert Wandruff Clerk

DEPUTY

Fifth Appellate District No. F027379
S079268
IN THE SUPREME COURT OF CALIFORNIA

MITSUE TAKAHASHI, Appellant

v.

Carolyn Phillips Et Al., Respondents

Appellant's petition for review DENIED.

Chief Justice

1407

FILED

OCT 1 1996

FRESNO COUNTY SUPREME COURT

By_____

G.R. DEPUTY

FILMED

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

MITSUE TAKAHASHI
Plaintiff,

vs.

CAROLYN PHILLIPS, an individual, MILROD & PHILLIPS, a legal partnership, And DOES I-X,
Defendants.

Case No. 507851-4

Judgement on Verdict on Jury Trial

The above-referenced action came on regularly for trial on September 9, 1996, in Department 52 of the Superior Court, the Honorable Franklin Jones, Judge of the Superior Court, presiding. Karen M. Goodman represented defendants Carolyn Phillips and Milrod & Phillips. Brian C. Davis represented plaintiff Mitsue Takahashi.

A jury of 12 persons was impaneled and sworn on September 10, 1996. Witnesses were sworn and testified. After hearing the evidence and the arguments of attorneys, the jury was instructed by the court and retired to consider its verdict.

After returning into court and being called, the jurors answered to their names and rendered their verdict in favor of the defendants and each of them as follows: (1) defendants were not negligent; and (2) defendants did not breach their contract with plaintiffs.

IT IS ADJUDGED that:

(1) Pursuant to the verdict, judgment shall be entered in favor of defendants:

(2) Plaintiff Mitsue Takahashi [shall take] recovers nothing from defendants, Carolyn Phillips and Milrod & Phillips;

(3) Defendants, and each of them, shall recover against plaintiff costs as allowable under the relevant statutory authorities, including, but not limited to, California Code of Civil Procedure sections 998, 1032, and 1033.5 in an amount to be determined by defendants' cost bill.

DATED: Sept. 30, 1996

Franklin P. Jones
JUDGE OF THE SUPERIOR COURT

COSTS ADDED TO JUDGMENT IN THE AMOUNT OF

$25, 331.47

Tamara L. Beard, Superior Court Clerk

By_____ 3-27-97

Deputy Dated

CERTIFICATE OF SERVICE

I, Alicia L. Fogal, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 3600 American River Drive, Suite 200, Sacramento, CA 95864.

On September 25, 1996, I served the following document(s) on the parties in the within action:

Judgment on Verdict on Jury Trial

BY MAIL: I am familiar with the business practice for collection and processing of mail. The above-described documents(s) will be enclosed in a sealed envelope, with first class postage thereon fully prepaid, and deposited with the United States Postal Service at Sacramento, California on this date, addressed as follows:

Brian C. Davis
802 14th Street
Modesto, CA 95354

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on September 25, 1996.

_____
Alicia L. Fogal

California Business and Professions Code, Section 6068 (a)-(h):

It is the duty of an attorney to do all of the following:
(a) To support the Constitution and laws of the United States and of this state.
(b) To maintain the respect due to the courts of justice and judicial officers.
(c) To counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
(d) To employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, or his or her client.
(f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.
(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

California Rules of Professional Conduct, Rule 3-700(C):

(C) Permissive Withdrawal
If rule 3-700(B) [mandatory withdrawal] is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:
(1) The client
(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
(b) seeks to pursue an illegal course of conduct, or
(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
(f) breaches an agreement or obligation to the member as to expenses or fees.
(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or
(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or
(5) The client knowingly and freely assents to termina-

tion of the employment; or
(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(2)

No. 99-750

In The

Supreme Court of the United States

MITSUE TAKAHASHI,

Petitioner,

v.

CAROLYN PHILLIPS, and MILROD & PHILLIPS,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Fifth Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court violated petitioner's rights to due process pursuant to the Fourteenth Amendment when it allowed respondent Carolyn Phillips to withdraw from representing petitioner and admitted prejudicial evidence in petitioner's subsequent lawsuit for breach of contract and negligence.

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RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Carolyn Phillips and the law firm of Milrod & Phillips ("Phillips") respectfully requests that this Court deny petitioner Mitsue Takahashi's petition for a writ of certiorari, which seeks review of the California Court of Appeals for the Fifth District of California's decision affirming the trial court's ruling on certain evidentiary issues.

OPINIONS BELOW

The opinion of the Court of Appeals which affirmed the Superior Court's rulings, was ordered not published.

JURISDICTION

The California Supreme Court denied petitioner's petition for review on June 30, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATUTORY/CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner in her petition invokes section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its Jurisdiction the equal protection of the laws." Petitioner further relies

on two state law provisions governing attorney conduct in California: (1) California Business and Professions Code Section 6068(c), which provides in pertinent part that an attorney is duty-bound to maintain only those actions "as appear to him or her legal or just"; and (2) California Rules of Professional Conduct, Rule 3-700(C)(1)(A), providing that an attorney may withdraw from representing a client where the client "insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law . . . "

STATEMENT OF THE CASE

In July of 1991, petitioner retained respondent Phillips to represent her in an employment discrimination action against her employer, Farmers Insurance. Petitioner and respondent entered into a legal services agreement governing the terms of the representation. Pursuant to the agreement, petitioner agreed to pay fees of $125 per hour until she had expended $25,000. Respondent agreed to provide services on a contingency basis once the $25,000 threshold was met.

During the next several months, serious and irreconcilable differences arose between petitioner and respondent, rendering respondent's continued prosecution of the employment action untenable. The differences included the parties' inability to agree on litigation

strategy and respondent's belief that petitioner misunderstood some of the key facts constituting the alleged basis of the employment action.

By March 1993, respondent determined that she could no longer represent petitioner in good faith. When petitioner refused to consent to a withdrawal, respondent filed a motion to withdraw. The motion was granted on April 27, 1993. The Court order granting the withdrawal did not address the parties' legal services agreement or any rights thereunder. Nor did it preclude petitioner from seeking recovery for any alleged breach of that agreement as a result of the withdrawal.

Petitioner ultimately secured new counsel to represent her in the employment action. However, after presenting her case, the trial court granted a nonsuit.

On April 15, 1994, petitioner filed the underlying complaint against respondents for breach of contract and attorney malpractice. The action was tried in Fresno County Superior Court in September 1996. The jury returned a defense verdict, finding that respondents had neither breached the legal services agreement nor committed malpractice.

Petitioner thereafter appealed the judgment in favor of respondents on the grounds that the trial court had erroneously admitted evidence of her psychiatric condition, the outcome of the employment action and unrelated legal proceedings. The Court of Appeal affirmed the judgment on the grounds any prejudice resulting from the subject evidence did not outweigh its probative value.

Petitioner thereafter sought review by the California Supreme Court. Review was denied June 30, 1999.

The instant petition is based upon grounds petitioner failed to raise and preserve in the lower courts. Although the scope and nature of this appeal is difficult to decipher, it appears that petitioner now claims that the lower court's ruling on the motion to withdraw, as well as the trial court's proceedings, deprived her of her constitutional rights to due process under the Fourteenth Amendment.

Petitioner's Statement of Facts is erroneous in numerous respects. First, petitioner has misstated the terms of the $25,000 retainer. The parties never agreed on a refundable retainer. Nor did they agree that respondents would assume the remaining fees and costs. Second, respondents did not engage in any concealment of the posture of the employment action at the time of the withdrawal. Finally, the filing of the lien did not breach the letter or spirit of the parties' legal services agreement.

REASONS PETITION SHOULD BE DENIED

I. Petitioner's alleged improprieties in the lower court proceedings do not constitute sufficient grounds for granting a writ of certiorari

This Court's Rule 10 sets forth the grounds for granting certiorari: (1) a conflict exists among certain courts on an important legal issue; (2) a decision by a court of appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power; or (3) a decision by a state

court or federal court of appeals on an important question of federal law has not been, but should be, settled by this Court.

The petition fails to raise any of these grounds. Reduced to its essence, the gravamen of petitioner's claim is "I did not win, therefore, my rights have been violated." Petitioner has failed to point to any lower court procedure, however, that deprived her of her constitutional rights. Petitioner cites to *Lear Inc. v. Adkins,* 395 U.S. 653, 668, apparently for the proposition that dissatisfaction with a contract does not justify a breach of that contract. Petitioner, however, has failed to demonstrate how that doctrine was contradicted during the trial court's proceedings. In fact, petitioner admits that the trial court presented such instruction to the jury.

Petitioner further cites to *Taylor v. Bemiss,* 110 U.S. 42 (1884) for the proposition that the Supreme Court will protect an aggrieved party where compensation to an attorney was so clearly excessive as to amount to extortion. Preliminarily, petitioner has misread the import of the case. *Taylor, supra,* applies only to actions against the United States. Second, as readily apparent from the Fifth District's rendition of the material facts, respondent carefully and conscientiously attempted to balance her obligations to her client and to the State Bar. She complied with the appropriate procedures set forth in the State Bar Code of Ethics regarding withdrawal. Such good faith lawyering cannot credibly be deemed an act of extortion.

II. Petitioner has failed to demonstrate the requisite state action in connection with her due process allegations

Petitioner claims that her rights to due process under the Fourteenth Amendment were somehow trampled in the lower court proceedings. The Fourteenth Amendment prohibits states from damaging constitutional rights and guarantees. It applies to state action, not acts of private persons or entities. *See, e.g., Rendell Baker v. Kohn,* 102 S.Ct. 2764, 2769 (1982). Petitioner has not and cannot point to any state action in this matter that, in any way, harmed her constitutional rights. Petitioner must concede that this dispute is essentially a private matter between private parties.

CONCLUSION

Petitioner presents no grounds justifying Supreme Court review of this matter. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 29, 1999

Supreme Court, U.S.
FILED
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No. 99-750

In The

Supreme Court of the United States

October Term, 1999

Mitsue Takahashi,

Petitioner,

v.

Carolyn Phillips, an individual;
Milrod & Phillips,

Respondents.

Petition for Writ of Certiorari
To the Court of Appeal of the State
of California, Fifth Appellate District

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY MEMORANDUM

Respondents' first argument is that the Petition for Writ of Certiorari should not be granted because there are not grounds for the granting of the petition. Respondents argue that the petition does not state grounds that squarely fit into one of the grounds set forth in Rule 10 of the Rules of the Supreme Court of the United States. Respondents have taken a literal reading of Rule 10 rather than recognizing that the grounds enumerated in Rule 10 are neither mandatory nor controlling on consideration of a Petition for Writ of Certiorari.

Rule 10 reads, in part, as follows: "The following, while neither controlling nor fully measuring the Court's discretion, indicate the *character* of reasons that will be considered..." Emphasis added. Thereafter there are three grounds set forth upon which a Petition for Writ of Certiorari may be based. Respondents would suggest these three are exclusive, unbending and mandatory.

In the current matter, the Petition for Writ of Certiorari requests that this court grant review to consider whether petitioner's Due Process rights have been infringed upon by the actions of the California state courts. The California statutes and rules set forth in the Petition for Writ of Certiorari, as implemented by the California state courts, have not been interpreted by this court in light of a litigant's due process rights.

Thus, while the Petition for Writ of Certiorari may not squarely fit into one of the grounds set forth in Rule 10, as respondents suggest, there are grounds sufficient for this Court to grant review. Were petitioner's

due process rights under the Fourteenth Amendment infringed upon by the California courts' interpretation of California law. This issue fits within the "character of reasons" for the granting of review as Rule 10 clearly indicates. Respondents' reading of Rule 10 is far too narrow and should be rejected.

Respondents also argue that Taylor v. Bemiss, 110 U.S. 42, 46, 3 S.Ct. 441, 28 L.Ed. 64 (1884) applies only to the United States. While the literal reading of that case may support such an argument, respondents have demonstrated by this claim that the current Petition for Writ of Certiorari may well fit into the narrow reading of Rule 10 that respondents rely upon. If respondents are correct in their narrow reading of Rule 10, the reliance upon the fact that Taylor v. Bemiss only applies to the United States may in fact place the current matter within Rule 10.1(c); or, at least within the "character of the reason" set forth therein.

Throughout the Brief in Opposition, respondents argue the merits of the matter rather than address the only issue currently before this Court; that is, whether there are sufficient grounds upon which this Court may grant the petition. The repeated references to the merits, rather than the issue of whether review should be granted, are significant. In addition, there are inaccuracies in respondents' Statement of the Case, and respondents have narrowed the Question Presented far too much. Respondents arguments should be rejected and the Petition for Writ of Certiorari should be granted.

Respondents' second argument for denying the petition is that the Fourteenth Amendment does not apply as this matter is a "private matter between private

parties". This argument is again a restricted reading of the Petition for Writ of Certiorari and should be rejected.

The state action upon which to base petitioner's claim that her Fourteenth Amendment rights were infringed upon is clearly set forth in the Questions Presented and the Statement of the Case in the opening brief. Furthermore, it is the actions of the California state courts that are challenged. The Petition for Writ of Certiorari clearly addresses whether the state courts' actions in the proceedings in this matter infringed upon petitioner's Fourteenth Amendment rights. For example, should the state courts have allowed petitioner's former attorney to testify against her former client on matters that were prejudicial to her client, or should the state courts have allowed petitioner's initial trial attorney to withdraw when she failed to inform the trial court of a pending dispositive motion, among other actions of the state courts. Thus, the petition sets forth state action sufficient to base petitioner's claim that her Fourteenth Amendment right to due process was infringed upon. Respondents' arguments in this regard should be rejected.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: December 28, 1999